UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD PACKAGING - LANCASTER, A Division of Cascades New York, Inc.,	)	
Respondent,	)	
- and -	)	
GRAPHIC COMMUNICATIONS CONFERENCE / INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M,	)	NLRB Case No.: 03-CA-210207
Charging Party,	)	

CHARGING PARTY'S POST-TRIAL BRIEF

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INTRODUCTION

Pursuant to the Board Rules and Regulations, 29 C.F.R. §102.42, Local 503 of the Graphic Communications Conference of the International Brotherhood of Teamsters ("Charging Party" or "Union"), submits the following brief in support of the Complaint introduced at trial in Buffalo, New York on April 30, 2018 against Cascades Containerboard Packaging – Lancaster, a division of Cascades New York, Inc. ("Company" or "Cascades"). *See* G.C. Ex. 1(c). As described in more detail below, the Union respectfully requests appropriate relief for these unfair labor practices, including, but not limited to, ordering Cascades (i) to resume recognition and bargaining with the Union as the exclusive bargaining representative; and (ii) processing and arbitrating grievances in accordance with the collective bargaining agreement.

At the outset, the Administrative Law Judge should appreciate the guidance from Justice Souter concerning skepticism related to an employer's challenge to the appropriate representative for the employees:

> "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom."
>
> *See Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996).

Similarly, in this case, the Company's contention that the Union is not the proper bargaining agent is unworthy of belief. The Union is the successor labor organization to Teamsters Local 27 with full authority to represent the Company's employees, engage in collective bargaining, prosecute grievances, and handle arbitrations for Cascades' employees. Without appropriate relief from the Board, the Company frustrates the employees' representation in contravention of the collective bargaining agreement that the Company adopted in October 2016.

STATEMENT OF THE FACTS

This dispute essentially began on August 25, 2017 when the Company insisted on a meritless standing defense to a routine wage grievance. On that fateful Friday, the Company's lawyer, Henry Kramer, sent an e-mail message to the Union's lawyer, Daniel Kornfeld, stating in pertinent part, "The Company's position is that Local 503 has no arbitration agreement with or standing to arbitrate anything with Cascades." *See* G.C. Ex. 18; Tr. 92 (emphasis in original). Had the Company simply continued with selecting the arbitrator and presented its worthless standing defense to that arbitrator, the parties would have avoided two District Court lawsuits and this case before the National Labor Relations Board.

Instead, the Company refused to select an arbitrator and started a chain of events leaving a decades-long bargaining relationship in tatters. First, the Company's refusal to proceed with arbitration meant the Union had little choice but to start a civil action in the United States District Court for the Western District of New York on August 29, 2017 to compel arbitration.[1] Then, the Company retaliated by repudiating the contract, revoking recognition of the exclusive bargaining agent, denying Union President Michael Stafford access to the facility, and a series of other activities that violate Sections 8(a)(1) and (5) of the Act. *See e.g.*, G.C. Exs. 31 and 32; Tr. 118. This also led the Region to seek injunctive relief from the same District Court on March 23, 2018.[2]

In responding to the Company's standing defense, no one denies that, effective October 2, 2016, the Company adopted the collective bargaining agreement that remains in effect through October 1, 2020. *See* G.C. Ex. 4; Tr. 55. This labor contract is the successor agreement to the one

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[1] *See Local No. 503 of the Graphic Communications Conference of the International Brotherhood of Teamsters v. Cascades Containerboard Packaging – Lancaster, a division of Cascades New York, Inc.*, Civil Action No. 7:17-cv-06605 (MAT/MWP).

[2] *See Murphy v. Cascades Containerboard Packaging – Lancaster*, Civil Action No. 1:18-cv-00375 (LJV). Both District Court cases are still pending.

President Stafford negotiated with the Company for the period October 2, 2013 through October 1, 2016. *See* G.C. Ex. 2, Tr. 48. These agreements, like their predecessors, require that the Company arbitrate the employees' grievances. *See* CBA Art. 5. Without union representation and the arbitration process, the employees have no meaningful mechanism to resolve their employment disputes with the Company. *See* Tr. 458.

In any event, the Company's standing defense must fail because the Union is the exclusive bargaining representative for Cascades' employees following the administrative transfer authorized by the International Union. *See* Tr. 32, 338. After all, there has been no change in Union leadership regarding this bargaining unit for almost six (6) years. From the start of the trusteeship in 2012 through January 16, 2018, the Company dealt with President Stafford as the chief negotiator and representative for the bargaining unit employees. *See* Tr. 39, 70, 93. President Stafford met with Cascades' employees at Tim Hortons, the Company's parking lot, a VFW hall, and at the Teamster Local 264 hall. *See* Tr. 41, 44, 72, 156. Beside negotiating the contracts, he handled unfair labor practice charges and other disputes on behalf of Cascades' employees. *See* G.C. Ex. 6, Tr. 40, 64. The same shop stewards and negotiating team represented the employees before and after the administrative transfer. *See* Tr. 42, 242. In fact, Joseph Nemerowicz, the shop steward and bargaining team member, testified about the Union's continuous representation of the Cascades' employees. *See* Tr. 257.

When the International Union ordered the administrative transfer in April 2017, this internal union reorganization did not relieve the Company of its collective bargaining duties. *See* Tr. 338.

- There was no change in the ability of the Company's employees to run for Union office and vote on their leaders. *See* Tr. 71-72, 225.
- There has been no change to the eligibility for membership, the benefits of membership, membership dates, the qualification to hold office, the oversight of the executive board,

and the right to vote on amendments to the governing documents, including the rights under the collective bargaining agreement and Teamsters constitution. *See* Tr. 73, 122.

- The dues and other fees charged by the Union to the Cascades' employees have not changed following the administrative transfer. Indeed, there are no financial impediments for the Cascades' employees participating in Local 503. *See* Tr. 74.

The Company's focus on the location of Local 503 offices is misleading. Meetings for the Cascades' employees take place at the Teamsters Local 264 Union Hall located at 35 Tyrol Drive, Cheektowaga, New York. *See* Tr. 69. This location is closer for the Cascades' employees than Local 27's former offices located at 828 Ellicott Square Building, Buffalo, New York.

The Company also misunderstands the Union composition before and after the administrative transfer. Before the trusteeship, the Cascades' employees represented about 20% of Local 27, and after the administrative transfer to Local 503, they represent about 10% of the local union. *See* C.P. Ex. 2, Tr. 134. That is not a significant dilution of their power despite the Company's arguments. Moreover, the Company inconsistently relies on 2017 membership data for the composition analysis, but denies that President Stafford has been handling the day-to-day services for the bargaining unit since 2012.

In the end, the Cascades' employees have the same accessibility to Union representation as before the administrative transfer. The Cascades' employees can still join the Union, attend Union meetings, present their views to their colleagues, vote on the labor contract, file grievances, and challenge the Union leadership. There has been no dilution of power. Instead, the Cascades' employees have gained power in their negotiations against Cascades, and that is why the employer has launched this campaign to challenge the administrative transfer.

ANALYSIS

An employer must bargain in good faith with a successor labor organization after an administrative transfer. *See NLRB v. Financial Inst. Employees of Am.*, 475 U.S. 192, 199 (1986) (recognizing that a union may change its name or affiliation so long as the union members have had an adequate opportunity to consider the affiliation and there was substantial continuity after the change); *Sullivan Brothers Printers v. NLRB*, 99 F.3d 1217, 1230 (1st Cir. 1996) (ordering printer to bargain with union formed after administrative transfers because substantial continuity occurred).

Indeed, an employer must arbitrate grievances with a successor labor organization pursuant to the predecessor organization's grievance procedure. *See Cincinnati Newspaper Guild, Local 9 v. Cincinnati Enquirer, Inc.*, 863 F.2d 439, 445 (6th Cir. 1988) (ordering employer to arbitrate with successor union and stating "the right of the employees to have their grievances arbitrated in accordance with the procedures hammered out between the employer and a properly recognized bargaining agent may not be abrogated by the employer merely because the employees subsequently see fit to change their agent"); *International Chemical Workers Union, Local No. 900 v. E.I. Du Pont De Nemours & Co.*, 615 F.2d 187, 190 (5th Cir. 1980) (requiring employer to arbitrate grievance because employer "has never provided a hint of a reason to doubt that the Chemical Workers is in fact the authorized agent" after Chemical Workers "ousted" the prior bargaining representative).

As Chief Judge William B. Shubb cogently explained in *Sunrise*, thorny successorship questions are "not present when a new representative seeks to enforce the terms of a CBA that the entity resisting enforcement was actually a party to." *See General Teamsters Union Local No. 439 v. Sunrise Sanitation Services, Inc.*, 2006 U.S. DIST. LEXIS 24524, *10 (E.D. Ca. April 26, 2006)

(citing *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 291 (1972), for the proposition that "an organization that merely stepped into the predecessor's shoes (*i.e.* a successor organization) can be bound to arbitrate with the original parties to the CBA"). For this conclusion, Judge Shubb relied upon the obvious point that a "Union's sworn testimony that it intended to be bound by an oral agreement sufficiently establishes, for summary judgment purposes, the Union's intent to be bound." *See Id.* at n. 4 (relying on *S. Cal. Painters & Allied Trade Dist Council No. 36 v. Best Interiors, Inc.*, 359 F.3d 1127, 1134 (9th Cir. 2004)).

Turning to the Board law, there is no doubt that, unless an employer can demonstrate a "sufficiently dramatic" change to alter the identity of the bargaining agent, the employer must recognize and bargain in good faith with the successor labor organization. *See e.g.*, *Creative Vision Resources, LLC*, 364 NLRB No. 91, pg. 16 (2016) (stating "where, as here, the local union leadership remains in place and continues to deal with an employer as before, very little has changed, particularly from the employees' point of view. In the present case, at least, no change has altered the local union's identity so much that it would raise a question concerning representation"); *Affinity Medical Center*, 362 NLRB No. 78, pg. 7 (2015) (stating "the affiliation of a smaller local union with a larger international union, and the increase in bargaining power associated with such an affiliation, does not, by itself, cause a discontinuity of representation such as to raise a question concerning representation"); *Raymond Kravis Center for the Performing Arts*, 351 NLRB 143, 148 (2007) (relying on extended membership rights, similar dues and fees, continued hiring hall procedures, perpetuation of the business agent, similarities in the constitution and bylaws; and continuation of vacation and pension benefits to conclude the "merger did not result in such a dramatic change to the Union as to raise a question concerning representation"); *Avante at Boca Raton, Inc.*, 334 NLRB 381, 387 (2001) (stating "in other respects and particularly

from the viewpoint of the employees, the affiliation caused little, if any change. In particular, there is no showing that the affiliation fundamentally altered the conduct of the day-to-day affairs of the Local Union organization").

Indeed, there is no "dramatic" change in a bargaining representative when a small labor organization is absorbed into a larger labor organization. *See e.g.*, *Fallbrook Hospital Corp.*, 360 NLRB 644, 657 (2014) (stating "increased financial support and bargaining power are ordinary, valid reasons for affiliations and mergers" and "the affiliation has changed virtually nothing with regard to the Union's leadership, the manner in which it represents its members, or its day-to-day operations") (citations omitted); *Defiance Hospital*, 330 NLRB 492, 498 (2000) (noting that "after the merger, virtually the only change in representation of these health care employee at the Hospital has been the identity of the staff representatives and the assistance that District 1199 (with 'dominance in health care field in Ohio') would provide in negotiations, grievance handling above step 2, and arbitration"); *Mike Basil Chevrolet*, 331 NLRB 1044, 1045 (2000) (stating "we have previously rejected relative size of the two organizations as a basis for finding discontinuity. Rather, the significant factor is whether there is an identity change as a result of the affiliation" and citing *CPS Chemical*, 324 NLRB 1018 (1997), *enf'd*, 160 F.3d 150 (3d Cir. 1998)).

The instant case is remarkably similar to the Board's decision in *Sullivan Brothers Printers*, 317 NLRB 561 (1995). In *Sullivan Brothers*, the Board noted that "at issue in this type of case are essentially internal union matter with respect to which, as noted above, a strong disapproval of unnecessary Board intervention has frequently been expressed by the courts and the Board itself." *Id.* at 562. In the end, the Board ultimately upheld the administrative transfer of sister locals in the printing industry. *Id.* at 565 (stating "the Board has not found increased size alone to be significant, especially where, as here, the merger of two sister locals is involved"). This reasoning

from *Sullivan Brothers* makes sense because otherwise employers could undermine legitimate, internal union decisions about how best to represent the employees.

Based on this authority, Cascades has failed to demonstrate a lack of continuity that justified the Company's repudiation of the labor contract and the withdrawal of recognition for the Union. The administrative transfer of Local 27 into Local 503 did not result in any "dramatic" change to the bargaining agent. In terms of Union leadership and day-to-day operations, President Michael Stafford continues as the responsible official for this bargaining unit as he has done since 2012. The same shop stewards and negotiating team has been in place for years. Similarly, the Union rights, responsibilities, benefits, and dues remain unchanged after the administrative transfer. This makes intuitive sense as both local labor organizations were affiliated with the Graphic Communications Conference of the International Brotherhood of Teamsters for decades.

The Company makes much of the location of the Union offices, but it misunderstands the Union's activities for the past four year. The Union has held meetings for Cascades' employees at the Teamsters Local 264 Union Hall located at 35 Tyrol Drive, Cheektowaga, New York. These meetings were actually closer for the Cascades' employees as compared to Local 27's former offices located at 828 Ellicott Square Building, Buffalo, New York. No one should be fooled by these spurious claims from the Company.

By the same logic, the Company is mistaken about the Union composition after the administrative transfer. At the outset, composition is irrelevant. *See e.g.*, *Mike Basil Chevrolet*, 331 NLRB at 1045. In any event, before the trusteeship, the Cascades' employees represented about 20% of Local 27, and after the administrative transfer to Local 503, they represent about 10% of the local union. There has been no dilution of the power of the Cascades' employees. On the contrary, the Cascades' employees now benefit from joining with numerous other bargaining

units that can assist each other in their negotiations with this Company and other businesses.

Furthermore, the Company's consternation over sufficient notice regarding the administrative transfer does not matter.

- The Company knew during the 2016 negotiations that the administrative transfer was imminent because of the pension and health benefits added to the contract in anticipation of Local 503 becoming the representative. *See* Tr. 56, 209, 304.
- After the transfer, the Company noted during an unfair labor practice charge settlement in May 2017 the preservation of rights, if any, regarding Local 503 as the representative. *See* Tr. 210.
- The Company started changing the name on letters to the Union and grievance forms in June 2017 in a meek effort to suggest the baseless, standing defense. *See* G.C. Ex. 9.
- The Company solicited tax forms to have the name of the Union changed on the dues checks in July 2017. *See* G.C. Ex. 10, Tr. 80.
- The Company even sent safety and health information to Local 503 as the bargaining agent in November 2017. *See* G.C. Ex. 28, Tr. 106.

These facts taken together with all the evidence of the Company communicating with, and engaging in bargaining against, the Union show that Cascades knew enough about the administrative transfer to respond if there was actually a "dramatic" change in the representation. Stated another way, after all the Company's communications with President Stafford throughout 2017, the Company cannot seriously contend that it did not know that Local 503 was the representative until January 2018, when it expelled him from the Lancaster facility.

Turning to the evidentiary issues, Cascades cannot rely on arguments concerning the missing Local 27 by-laws to escape its burden of proof on the continuity issue. As a matter of law,

the Company is not entitled to a negative inference on an issue for which it bears the burden of proof. *See e.g., NLRB v. Louis A. Weiss Mem. Hosp.*, 172 F.3d 432, 446 (7th Cir. 1999) (stating an "absence of evidence does not cut in favor of the one who bears the burden of proof on an issue"); *Ridgewell's Inc.*, 334 NLRB 37, 42 (2001) (stating "while the record is silent on the opportunity for discussion before the four votes, or whether the votes were held by secret ballot, Ridgewell's faults the General Counsel for failing to examine at trial Local 32's President Minor Christian about these matters and further, requests that an adverse inference be drawn regarding this failure. However, such an inference is unwarranted because Ridgewell's has the burden of proof on this issue and still failed to call any witnesses on its own to prove any lack of due process regarding the merger vote").

Here, Cascades is not entitled to a negative inference because the Union is unable to locate the by-laws that were set aside by the trusteeship in 2012 and that were super-ceded by the International Constitution. *See* Tr. 181, 339. After all, the Company could have contacted former President Tony Roman or someone else to get a copy of the Local 27 by-laws if the Company wanted to meet its evidentiary responsibility. As a matter of law, the Company has not shown that an adverse inference is warranted over the by-laws issue, especially as it is an issue for which the Company has the burden of proof.

Additionally, pursuant to Rule 1004(1) of the Federal Rules of Evidence, a proponent may introduce testimony instead of the original documents where the original documents have been lost or destroyed. *See e.g., Smoky Mountain Secrets, Inc. v. U.S.*, 910 F. Supp. 1316, 1322 (E.D. Tenn. 1995) (accepting that, although the taxpayer could not produce copies of the original written contracts, the court would accept testimony "that each telemarketer and delivery person signed written contracts as a matter of corporate policy"); *Burroughs Wellcome Co. v. Commercial Union*

Ins. Co., 632 F. Supp. 1213, 1222 (S.D.N.Y. 1986) (permitting incomplete documentary evidence regarding insurance contracts "since a diligent but unsuccessful search and inquiry has been made," and the court was "satisfied that Burroughs has proved loss or destruction of the documents"); *White Industries, Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1071 (W.D. Mo. 1985) (permitting the admission of "summaries" of missing documents as there was "no indication that plaintiffs were responsible for the loss or destruction of the files, much less that they acted in 'bad faith' in connection therewith").

In this case, President Stafford testified about the Local 27 by-laws, and that testimony should be sufficient concerning the content of the by-laws as the original documents have been lost. President Stafford explained that he had the by-laws during the investigation of the charge, but the documents were lost as part of disclosing documents to the Region. *See* Tr. 180. In instances like this, where documents are unavailable after a diligent search, the appropriate course is to rely on President Stafford's testimony as he is the person familiar with this information before the documents went missing.

Furthermore, the legal authority asserted by the Company is also inapposite. For example, the Company's reliance on *Quality Inn Waikiki*, 297 NLRB 497 (1989), is misplaced because this pre-*Kravis* opinion is factually distinguishable. In *Waikiki*, the successor union "had originally been chartered as a result of complaints that" it "did not provide equal representation to employees." *See Id.* at n. 1. As the instant case has no history of "internal difficulties" between Locals 27 and 503 that might prevent employees from participating Local 503 activities, *Waikiki* does not support Cascades' challenges to the administrative transfer.

Similarly, an Advice Memorandum dealing with administrative transfers between two viable locals is unhelpful for the Company. *See Goad Co.*, NLRB Div. of Advice No. 14-ca-25345

(February 25, 1999). In *Goad*, the Missouri employer maintained (despite also filing an RM petition) that its collective bargaining agreement with one viable local in Philadelphia prevented the administrative transfer to another viable local in Missouri, which has a "contentious past history" with the employer. The Division of Advice reasoned that amending the certification is not available where the "originally certified union exist[s] as a viable labor organization." *See Id.* pg. 3 (citing *Gas Service Co.*, 213 NLRB 701 (1974)). As Local 27 ceased being viable without a trusteeship in 2012, there is no obstacle to Local 503 succeeding as the appropriate representative using the logic from *Goad*.

When all the dust settles, actions speak louder than words. Here, it speaks volumes that no one challenged the administrative transfer for months while the Union continued to represent Cascades' employees. For instance, the bargaining unit employees that testified at the hearing hardly noticed any change in their representation after the administrative transfer in April 2017. *See* Tr. 247, 370. Although the Company objected to Local 503's representation in a Labor Board settlement in May 2017, it did not start directly dealing with the employees until December 2017. *See* G.C. Ex. 31. And, the Company expelled President Stafford in January 2018. *See* Tr. 453. There could be no "dramatic" change in representation because, for over six months after the administrative transfer, the Company and the employees continued to deal with the Union in the same way on numerous issues like attendance, scheduling, safety, and wages.

The Company cannot defend against these unfair labor practice charges with misleading contentions about the location of the Union meetings or the density of the Union's membership. To prevail, Cascades must sufficiently explain why it waited until December 2017 - months after the Union had started the District Court case to compel arbitration in August 2017 - to repudiate its relationship with the Union and undermine years of productive labor relations. It makes no

sense that some brief submitted to the District Court case alerted the Company to the administrative transfer. On the contrary, the Company's continuous acceptance of Local 503 as the agent until December 2017 or January 2018 further demonstrates that no dramatic change occurred.

In sum, this case is really about meaningful representation for Cascades' employees. Local 27 was no longer viable, so the International Union administratively transferred the unit into Local 503. That is not "dramatic," it is an administrative reshuffle. The Company argues mightily in favor of a shell for a bargaining representative when the International Union has decided the way to represent Cascades' employees effectively is to complete the administrative transfer. As much as the Company would prefer a weakened labor organization to bargain against, that is not what the labor laws and fundamental decency require.

CONCLUSION

WHEREFORE, the Union respectfully requests that the Board find that Cascades Containerboard Packaging – Lancaster, a division of Cascades New York, Inc. violated Sections 8(a)(1) and (5) of the National Labor Relations Act as explained by the General Counsel, and that the Board remedy the violations as the Board deems just and proper.

Dated: June 21, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of June 2018, the undersigned served a copy of the foregoing Charging Party's Brief on the attorney for the General Counsel and Respondent's counsel by depositing a true copy of the same in the United States mail, postage pre-paid, as well as via e-mail and addressed to their last known addresses, to wit:

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